88- 1787

Supreme Court, U.S.
FILED
MAY 3 1989

No. .....

In The

Supreme Court of the United States

October Term, 1988

ROBERT W. HALL,

Petitioner,

v.

NEAL K. OKABAYASHI, an individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

ROBERT W. HALL
Seven Waterfront Plaza
500 Ala Moana Boulevard
Suite 7-400
Honolulu, Hawaii 96813
(808) 545-3800
Petitioner

May 2, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION(S) PRESENTED

Does a state intermediate court of appeals offend the federal constitution or violate federal law when it requires a pro se petitioner to pay a frivolous appeal punitive sanction of $5,007.35 without any prior notice, hearing, due process or finding of bad faith whatsoever? Does Hawaii's application of Rule 38 of the Hawaii Rules of Appellate Procedure offend federal law or the federal constitution?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Robert W. Hall and the respondents Neal K. Okabayashi, John J. Hulten, Jr., Attorney at Law, a Law corporation, Henry E. Howard, Exit Company Limited Partnership dba Executive Centre, Bancorp Hawaii Service Corporation and Bel-Centre, Inc., dba Executive Centre. Bancorp Hawaii Service Corporation is affiliated with the Bank of Hawaii. Bel-Centre, Inc. is affiliated with Belmarin Investments N.V., a Netherlands Antilles company.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdictional Statement	2
Constitutional Amendments & Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	9
I. The Hawaii ICA decision has chilling implications far beyond the petitioner	9
II. The Hawaii courts have waived their general jurisdiction	9
Conclusion	9
Appendix	App. 1

TABLE OF AUTHORITIES

	Page
Burns v. Ohio, 360 U.S. 252 (1959)	9
Hall v. Cole, 412 U.S. 5, 93 S.Ct. 1946 ( )	8
Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc., 6 Haw. App. 431, 696 P.2d 852 (1986)	9
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	10
Matthews v. Huwe, 269 U.S. 262 (1925)	9
McCandless v. Great Atlantic and Pac. Tea Co., Inc., 697 F.2d 198 (1983)	8
McCoy v. Wisconsin Court of Appeals, 87-5002 (January 20, 1988)	6
Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)	4, 9
Testa v. Katt, 330 U.S. 386 (1947)	9
Tumey v. Ohio, 273 U.S. 510 (1927)	9

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PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

—o—

The petitioner Robert W. Hall respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Hawaii Intermediate Court of Appeals, entered in the above-entitled proceeding on March 8, 1989 and January 12, 1989 respectively.

OPINION BELOW

The opinion of the Hawaii Intermediate Court of Appeals is an unreported memorandum opinion, p. 1a, *infra*.

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JURISDICTIONAL STATEMENT

This petition is from a final judgment by the highest court of the State of Hawaii and draws into question the validity of a statute of the State of Hawaii as being repugnant to the constitution or laws of the United States. Petitioner's rights are also claimed under the constitution and statutes of the United States.

Invoking federal jurisdiction, the petitioner filed a motion for reconsideration with the Hawaii ICA and a petition for certiorari with the Hawaii Supreme Court raising the constitutional issues and federal statutory issues raised herein. Both motions were summarily denied. The federal issues which are the subject of this petition were unexpectedly raised by the Hawaii Intermediate Court of Appeals ("Hawaii ICA") in its January 12, 1989 memorandum opinion, an opinion that completely surprised the petitioner. The underlying action was dismissed on respondents' Henry E. Howard, Exit Company Limited Partnership and Bancorp Hawaii Service Corp.'s motion for summary judgment without a finding that the action was frivolous, pp. 15-16a, *infra*). No hearing was ever held on the question of the penal sanction. The Hawaii ICA appeal decision was entered without an oral hearing despite the petitioner's timely motion for oral hearing. Judgment on appeal was entered March 8, 1989.

CONSTITUTIONAL AMENDMENTS AND STATUTE INVOLVED

A. First Amendment to the Constitution of the United States (in part):

> Congress shall make no law . . . prohibiting . . . the right of the people . . . to petition the Government for a redress of grievances.

B. Fifth Amendment to the Constitution of the United States (in part):

> No person shall be . . . deprived of . . . property, without due process of law, . . .

C. Fourteenth Amendment to the Constitution of the United States (in part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. Sections 1983 of Title 42 of the United States:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

E. Rule 38, Hawaii Rules of Appellate Procedure, Frivolous Appeals:

> If a Hawaii appellate court shall determine that an appeal decided by it was frivolous, it may award

damages including reasonable attorneys' fees and costs to the appellee.

F. Hawaii Revised Statutes, § 607-14.5 Attorneys' fees in civil actions:

> (a) In any civil action in this State where a party seeks money damages or injunctive relief, or both, against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party, and enter as part of its order, for which execution may issue, a reasonable sum for attorneys' fees, in an amount to be determined by the court upon a specific finding that the party's claim or defense was frivolous; provided the amount shall not exceed twenty-five per cent of any amount originally prayed for by the party assessed. (b) In determining the award of attorneys' fees and the amounts to be awarded, the court must find in writing that all claims or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action. [L 1980, c. 286, §1; am L Sp 1986, c 2, § 13]

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STATEMENT OF THE CASE

The pro se petitioner was bushwacked and blind-sided. Without any warning whatsoever, the Hawaii court held that the petitioner's appeal was "frivolous". The Hawaii ICA ordered the petitioner "to pay Defendants reasonable attorney's fees and costs for this appeal" which were filed and ordered in the amount of $5,007.35, without any due process or hearing.

No court ever made any finding of bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. at 764, 100 A. S.Ct. at 2463, 65 L.Ed.2d at 500. No court ever made any finding

of intent on the part of the petitioner to harass or delay in connection with the action or the appeal. The petitioner never had any notice of the extraordinary consequences the court was considering. No consideration was ever made of the petitioner's pro se status. The pro se petitioner is not formally trained in law and is completely self taught. The petitioner does not have a license to practice law. The pro se petitioner is not an officer of the court.

The petitioner felt that he had an excellent chance of winning on appeal since among other reasons, the court below refused to consider any of the petitioner's affidavits or 9 noticed witnesses in granting summary judgment. The petitioner's appeal was well reasoned and was not an affront to the orderly administration of justice or to the dignity of the court.

The petitioner had reasonable expectations of prevailing on appeal. It took the Hawaii ICA 16 pages of memorandum opinion to deny the appeal, pp. 1-16a, *infra*. The Hawaii circuit court below did not find the action frivolous and there is no language in the December 22, 1987 circuit court order that even suggests that the action was frivolous. No finding of bad faith, harassment or delay was ever made against the petitioner by any court. Petitioner was never warned by the Hawaii ICA that it was considering punitive sanctions prior to the entry of the memorandum opinion which included the punitive sanction. When the petitioner timely requested an oral hearing for the appeal hearing itself, the request was denied without explanation. A motion for reconsideration of the memorandum opinion was denied without hearing. A certiorari petition to the Hawaii Supreme Court was denied without hearing or comment.

The essence of this appeal is that the Hawaii Supreme Court has adopted, and the Hawaii ICA has applied a patently unconstitutional court Rule 38, Hawaii Rules of Appellate Procedure, p. 3, ¶ E, *supra*. The findings required in H.R.S. § 607-14.5(b) were never made, p. 3, ¶ F *supra*. The "manifestly and palpably without merit" standard adopted by the Hawaii courts conflicts directly with its own state's statutes and the federal constitutional protections cited herein. Neither the Hawaii legislature nor the federal Congress has ever adopted any law requiring the losing parties on appeal to pay punitive sanctions according to the "manifestly and palpably without merit" standard or any other standard, and certainly not without due process.

The following argument was a part of the petitioner's pleadings in both the motion for consideration and the petition for certiorari. The argument referenced below was included in the motion for reconsideration as paragraphs 62-66, pp. 23-25, and in the petition for certiorari as paragraphs 5-9, pp. 2-4:

Frivolous, attorney's fees and costs

62. "Justice [John M.] Harlan said if you can point to anything arguable, it's not frivolous," Justice Byron R. White recalled during oral arguments January 20, 1988 in *McCoy v. Wisconsin Court of Appeals*, 87-5002. The appeals court has no obligation to discuss why anything arguable is frivolous and not worthy of being pressed to appeal. The proof that something is arguable lies in the fact that it took the appeals court 16 pages to list the arguable points. That fact is mutually exclusive to a "frivolous" finding. This motion constitutes a second list of arguable points.

63. Absent extraordinary circumstances, procedural due process requires notice and hearing before any governmental deprivation of a significant property interest. *Bodie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). Any statute or court rule including Rule 38, Hawaii Rules of Appellate Procedure (HRAP), depriving the pro se plaintiff-petitioner or any other person of the significant property interest of attorney's fees and costs without due process is patently unconstitutional under both the federal and state constitutions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980). See also, *Fuentes v. Sherin*, 407 U.S. 67, 88-90 & n. 21, 92 S.Ct. 1983, 1998-1999 & n. 21, 32 L.Ed.2d 556 (1972) and *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516 (1983). If an experienced attorney cannot be relieved of his property without due process, it boggles the mind that the appeals court would attempt to relieve Hall, a pro see litigant, of his property in a summary proceeding without due process. To make matters worse, Hall was denied an oral appeal hearing despite a timely filed application. It should also be noted that the appeals court did not find that Hall acted in bad faith, an essential finding.

64. Any attempt to levy attorney's fees on Hall is an attempt by opposing counsel acting in concert with state officials (i.e., the judges of this appeals court acting as individuals) to deprive Hall of his civil rights in violation of 42 U.S.C. § 1983.

65. In the alternative, in determining the instant award of attorney's fees and the amounts to be awarded the appeals court failed to find in writing that all claims made by Hall are completely frivolous and are totally unsupported by the facts and the law in the civil action. The required finding and the specific language required by statute is not in the Memorandum Opinion. The required finding is mandated by H.R.S. § 607-14.5.

66. The instant ruling flies in the face of the general rule that each litigant should pay his own fees

and costs. The effect of assessing Hall attorney's fees and costs is an obvious attempt to penalize Hall for merely prosecuting a lawsuit. The court below did not make a "frivolous" finding. Hall was assessed attorneys fees and costs for suing an attorney and then filing an appeal after a circuit court summary judgment decision. Fee shifting is punitive which requires a finding of bad faith. *McCandless v. Great Atlantic and Pac. Tea Co., Inc.*, 697 F.2d 198, 200 (1983). See also, *Hall v. Cole*, 412 U.S. at 5, 93 S.Ct. at 1946.

The Hawaii ICA decision is an effective prohibition of the right of the people to petition the Government for a redress of grievances (First Amendment). The Hawaii ICA decision deprives the petitioner of a valuable property right without due process of law (Fifth & Fourteenth Amendments). The Hawaii ICA decision abridges the petitioner's right to his federal constitutional rights and denies the petitioner the equal protection of the laws with all other petitioners (Fourteenth Amendment). In the process of the decision, the members of the Hawaii ICA and the Hawaii Supreme Court acted under color of unconstitutional court rule as individuals in order to deprive the petitioner of his constitutional rights (42 U.S.C. § 1983).

REASONS FOR GRANTING THE WRIT

I

The Hawaii ICA Decision Has Chilling Implications Far Beyond The Petitioner.

Hawaii appeals courts are putting a price on appeal justice. If a pro se petitioner can be punitively sanctioned $5,997.35 without due process, then the financial

message of appeal in Hawaii is chilling indeed. "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. at 767, 100 A. S.Ct. at 2465, 65 L.Ed.2d at 502; *Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc.*, 6 Haw. App. at 436, 696 P.2d at 857.

The Hawaii Courts Have Vacated Their General Jurisdiction Responsibilities.

The Hawaii ICA decision is a perfect example of a state court waiving its general jurisdiction responsibilities to federal legal precedent. The Hawaii decisions cited herein fly in the face of this Court's decision affirming the general obligation mandate of state courts to enforce federal constitutional rights violated by state court policies or court rules. *Testa v. Katt*, 330 U.S. 386 (1947).

The refusal of the Hawaii appeal courts to provide a forum under the circumstances described herein in and of itself raises a constitutional issue. *Burns v. Ohio*, 360 U.S. 252 (1959). The acts of the Hawaii appeals courts described herein are unconstitutional and completely outside of all applicable law. *Tumey v. Ohio*, 273 U.S. 510, 551 (1927); *Matthews v. Huwe*, 269 U.S. 262 (1925). The act of the Hawaii Intermedite Court of Appeals in ordering punitive penal sanctions against the petitioner is even more stunning in light of the ICA's exactly opposite decision in *Kukui Nuts of Hawaii, Inc., v. R. Baird & Co., Inc.*, 6 Haw. App. at 436, 696 P.2d at 857.

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CONCLUSION

For the reasons given herein, this petition for certiorari should be granted. Either the acts alleged herein are patently unconstitutional or constitutional due process protections are an illusion.

Justice Marshall stated the reason why certiorari should be granted in *Marbury:* "The very essence of civil liberty lies in the right of the individual to claim the protection of the laws whenever he receives an injury . . . . It is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

When courts ignore the law they are supposed to interpret, serious issues are raised. The Hawaii appeals courts are slowly imposing a system of intimidation affecting not only the petitioner, but others as well. In the absence of constitutional authority or legislative act, the Hawaii ICA decision is wrong. The implications of the Hawaii Supreme Court's acts and omissions, hidden from public scrutiny by use of an unpublished opinion, are also disturbing.

Respectfully submitted,

ROBERT W. HALL
Seven Waterfront Plaza
500 Ala Moana Boulevard
Suite 7-400
Honolulu, Hawaii 96813
(808) 545-3800
Petitioner

May 2, 1989

APPENDIX

NO. 12670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT W. HALL, an Individual, Plaintiff-Appellant, vs. NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR., ATTORNEY AT LAW, A LAW CORPORATION, A Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation, Defendants-Appellees.	CIVIL NO. 87-2390 Appeal from the: 1) Order granting defendants Henry E. Howard, Exit Company Limited Partnership and Bancorp Hawaii Service Corp.'s Motion For Summary Judgment and denying Plaintiff's Crossmotion For Summary Judgment, filed December 22, 1987; 2) Order denying Fourth Crossmotion to strike or in the Alternative an objection, filed December 7, 1987; 3) Order denying Fifth Crossmotion to strike, for default or in the alternative an objection, filed December 3, 1987; and 4) Order re defendant Bel-Centre, Inc.'s Motion To Dismiss Amended Complaint and Joinder in Defendants Henry E. Howard, Exit Company Limited Partnership and Bancorp Hawaii Service Corp.'s Motion to Dismiss, or alternatively, for Summary Judgment, filed October 21, 1987 FIRST CIRCUIT COURT Honorable Robert G. Klein Honorable Simeon Acoba, Jr., Judges

MEMORANDUM OPINION

(Filed January 12, 1986)

Plaintiff-Appellant Robert W. Hall (Hall) appeals from (1) the summary judgment entered in favor of Defendants-Appellees Exit Company Limited Partnership (Exit), Exit's general partner Bancorp Hawaii Service Corp. (Bancorp), Bancorp's president Henry E. Howard (Howard), John J. Hulten, Jr., a Law Corporation (Hulten), and attorney Neal K. Okabayashi (Okabayashi);[1] (2) the lower court's order dismissing Hall's action against Defendant-Appellee Bel-Centre, Inc. (Bel-Centre;[2] and (3) the denial of his fourth and fifth motions to strike.[3] We find no error and affirm. Additionally, we find the appeal frivolous.

FACTS

In 1986 Exit owned the Executive Centre, an office-residence condominium building in downtown Honolulu, and had leased Unit 709 in the building to Julia Sohn, Inc. (Sohn). A lease provision prohibited Sohn from assigning it without Exit's prior written consent. In mid-1986 Sohn attempted to obtain Exit's consent to assign the lease to Airlines Capital Corp. Inc. (ACCI), a Delaware corporation of which Hall was chairman of the board,

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[1]Where appropriate, Exit, Bancorp, Howard, Hulten and Okabayashi will be collectively referred to as Exit Defendants.

[2]On appeal Exit, Bancorp, Howard, and Bel Centre filed a joint answering brief, which will be referred to as Exit's answering brief. Okabayashi joined in Exit's answering brief, and Hulten filed a separate answering brief.

[3]Where appropriate, all of the Defendants-Appellees will be referred to as Defendants.

president, treasurer, and sole director. However, on July 30, 1986, Executive Centre's manager, Melvin R. Anderson (Anderson), advised Sohn by letter that Exit would not approve an assignment of the lease to Hall or any company owned by him until he complied with Executive Centre's "application, financial disclosure, and personal guaranty procedures." On August 29, 1986, despite the fact that neither ACCI nor Hall had complied with the conditions of the July 30, 1986 letter, Sohn executed an assignment of the lease to ACCI.[4] ACCI took possession of Unit 709, but we do not know when.

On October 29, 1986, Exit, through its attorneys, Hulten and Okabayashi, filed a summary possession and assumpsit action against Sohn and ACCI (Civil No. 86-4562) based on the unauthorized assignment of the lease. Exit filed a motion for summary judgment in Civil No. 86-4562 on the issue of its right to possession to which it attached an affidavit by Anderson, reading in part as follows:

> 11. That Exit is and was aware of Hall's bankruptcy petition and that he has been adjudged disabled and is receiving disability income because he was judged incapable of working.
>
> 12. Exit is also aware that a previous corporation managed by Hall filed for bankruptcy.

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[4]In a September 4, 1986 letter, Executive Centre informed Sohn that Executive Centre could not process the assignment until Hall completed the application and provided "financial information regarding himself, the Company or companies he represents, and [ACCI]. Also, he has not expressed any willingness to execute any guaranty [sic] of the lease. Without the stated documents, approval of a lease assignment cannot and will not be granted."

On June 1, 1987, Bel-Centre acquired Executive Centre from Exit, and on July 26, 1987, prior to the hearing on Exit's motion for summary judgment in Civil No. 86-4562, Hall wrote to Bel-Centre and personally guaranteed the assignment of the lease from Sohn to ACCI. Subsequently, ACCI transmitted to Bel-Centre its assignment of the lease to Hall, individually, and asked for Bel-Centre's consent to this assignment. Exit's motion for summary judgment in Civil No. 86-4562 was granted and ACCI appealed. In the disposition of the appeal, we held that the issue regarding summary possession had been rendered moot pending appeal, vacated the judgment, and remanded the case with direction that count I (the summary possession count) of Exit's complaint be dismissed.[5] *Exit Company Limited Partnership v. Airlines Capital Corp., Inc.*, 7 Haw. App. — (No. 12833, December 20, 1988).

Hall's initial complain in this action, filed on July 28, 1987, was dismissed on Defendants' motion. In an amended complaint filed on September 14, 1987, Hall sought general, special, and punitive damages, charging (1) coercion by the Defendants in their efforts to get him to personally guarantee ACCI's performance of the lease

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[5]Count II of Civil No. 86-4562 was a claim for rent. ACCI filed an answer and counterclaim. Our decision in Civil No. 86-4562 did not dispose of either count II or ACCI's counterclaim in that case. In a "Notice of Intermediate Court of Appeals Decision' filed on December 23, 1988, Hall claims our Civil No. 86-4562 decision is favorable to him and requests a *sua sponte* remand of this matter for trial. Since, as stated, we did not deal with ACCI's counterclaim in Civil No. 86-4562, our decision there has no effect on the disposition of this case.

provisions, (2) invasion of Hall's right to privacy under article I, section 6, of the Hawaii State Constitution, and (3) defamation.

Exit, Bancorp, and Howard jointly filed a motion to dismiss the amended complaint or in the alternative for summary judgment (Motion for Summary Judgment) in which Hulten and Okabayashi joined. Bel-Centre filed a separate motion to dismiss and joined in the Motion for Summary Judgment. The trial court granted Bel-Centre's motion to dismiss on October 21, 1987, and the Motion for Summary Judgment on December 22, 1987.[6]

We will discuss first the Motion for Summary Judgment.

I.

A.

In resisting the Motion for Summary Judgment, Hall filed no responsive documents.[7] Instead, he filed three motions to strike the documents submitted in support of the Motion for Summary Judgment on the ground that

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[6]Hall also filed a cross-motion for partial summary judgment "with regard to any and all claims as to which partial summary judgment may be granted against the defendants[,]" which was denied in the same December 22, 1987 order.

[7]On August 24, 1987, prior to dismissal of the original complaint, Hall filed a cross-motion for partial summary judgment, or for leave to file an amended complaint. On September 25, 1987, Hall's motion for partial summary judgment was denied and his motion for leave to file an amended complaint was granted. On appeal Hall argues that the cross-motion for partial summary judgment raised genuine issues of fact. The argument is obviously without merit in view of the amended complaint and subsequent proceedings.

the documents were inadmissible as evidence.[8] We have carefully examined the documents attacked by Hall and find they were properly considered by the lower court.[9] In not presenting factual matters contravening Exit Defendants' evidence, Hall failed to meet his burden of showing a genuine issue of material fact.[10] *Costa v. Able Distributors, Inc.*, 3 Haw. App. 486, 653 P.2d 101 (1982).

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[8]On appeal Hall argues that the lower court erred in leaving his first three motions to strike in "limbo" by not specifically ruling on them. However, in an order entered on November 16, 1987, the court granted Hall's first three motions to strike as they applied to Bel-Centre's motion to dismiss, but reserved ruling on the motions as they applied to the Motion for Summary Judgment. In our view, the summary judgment was an implicit denial of Hall's first three motions. This view is supported by the lower court's statement at a November 17, 1987 hearing that it had considered the documents in deciding the Motion for Summary Judgment.

[9]The documents attacked by Hall consist of pleadings relating to Exit's motion for summary judgment in Civil No. 86-4562, and attached exhibits; a transcript of the hearing on the motion for summary judgment in Civil No. 86-4562; an affivadit filed by Hall in the United States Bankruptcy Court for the District of Hawaii in Adv. Pro. No. 85-0043, *Hall v. First Fed. Sav. & Loan Ass'n of Am.*; a prior memorandum filed by Defendants in this case; the annual corporate exhibit for ACCI on file with the State Department of Commerce and Consumer Affairs; July 31, 1987 minutes of the first circuit court in Civil No. 86-4562; and Findings of Fact, Conclusions of Law, and Order in *First Fed. Sav. & Loan Ass'n of Am. v. Hall*, First Circuit Court Civil No. 85-0151.

[10]Hall's first motion to strike included a motion for partial summary judgment and an affidavit from Hall. However, Hall's affidavit does not present factual matter creating any genuine issue of material fact.

The affidavit merely stated: that he had not signed the August 29, 1986 lease assignment from Sohn in an individual capacity; he had not waived his right to privacy regarding his

(Continued on following page)

Hall's tactic was based on his misplaced reliance on *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *Celotex* holds that, although the moving party has the burden of showing that there is no genuine issue of material fact and the non-moving party is not required to file responsive affidavits, the non-moving party must nevertheless show that there is a genuine issue of fact by reference to facts on the record outside the pleadings.[11] Consequently, the question is whether Exit Defendants are entitled to judgment as a matter of law. *Bidar v. AMFAC, Inc.*, 66 Haw. 547, 669 P.2d 154 (1983). We hold they are.

(Continued from previous page)

"personal financial affairs;" that he had been involved in other legal matters with Okabayashi and their relationship was not cordial; that he did not want to reveal his personal finances to Okabayashi because he knew Okabayashi would use the information against him in the proceedings; that he personally guaranteed the lease assignment from Sohn to ACCI, and executed the further assignment from ACCI to himself under the threat of coercion and extortion; that Bel-Centre's manager told him that Bel-Centre would not approve ACCI as a tenant because of "derogatory personal information" supplied by Okabayashi; that Exit "made it clear" to him that they wanted his personal financial information and his personal guarantee before they would consider approving the assignment; that he requested Hulten to stop Okabayashi from defaming him; that Exit never told him what their financial requirements were and that he had reason to believe that the audited financial statements requested from ACCI were unique to ACCI's application; that he was never judged incapable of working; that he denied that his management of any corporation resulted in its bankruptcy; that Okabayashi was the source of the false and defamatory statements in Anderson's affidavit.

[11]Again citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), Hall argues that Exit Defendants were required to depose his witnesses before they could show there was no genuine issue of fact. *Celotex* does not support the argument.

B.

1.

HALL'S COERCION CLAIM

The thrust of Hall's coercion claim is that Exit attempted to coerce him into signing a personal guarantee of the assignment from Sohn to ACCI, although he had no personal interest in ACCI, and was merely an officer-employee. The argument is without merit.

Sheraton Hawaii Corp. v. Poston, 51 Haw. 142, 454 P.2d 369 (1969), is dispositive of Hall's coercion claim. In that case the supreme court stated that

> [a]n essential ingredient of 'business compulsion,' a term of art, is duress or coercion in the origin of an alleged legal right. *London Homes, Inc. v. Korn*, 234 Cal. App. 2d 233, 241, 44 Cal. Rptr. 262, 267 (1965). Business compulsion is not necessarily established by proof that consent was secured by the pressure of financial circumtances, *Kohen v. H.S. Crocker Co.*, 260 F.2d 790, 792 (5th Cir. 1958).

Sheraton, 51 Haw. at 146, 454 P.2d at 372. The supreme court held in *Sheraton* that the evidence was insufficient to establish business compulsion where the defendants, plaintiff's lessees, whose corporation's [sic] jewelry shop lease was expiring, were required, in order to obtain a renewal of their original lease, to execute a lease on a second shop and to personally guarantee that second lease.

Here, Exit Defendants presented documentary evidence showing that Hall personally had filed a chapter 7 bankruptcy proceeding (Bk. No. 82-00603) in the bankruptcy court for the District of Hawaii. ACCI's foreign

annual corporate exhibit for 1984, which is in the record, shows Hall is chairman of its board of directors, is the statutory agent of record, and holds every office in the corporation except secretary, which is held by Hall's wife, Bertha S. Hall. Those facts justified a concern by Exit over performance of the lease by ACCI. Consequently, it was not unreasonable for Exit to require ACCI and Hall to comply with its requirements for giving its consent. Hall was the only person to whom Exit could look for a guarantee of ACCI's performance. That he was not shown to own ACCI is of no import. For all practical purposes he was ACCI in Hawaii.

In *Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw. App. 272, 630 P.2d 646 (1981), we held that "where a party's manifestation of assent is induced by an improper threat that leaves him no reasonable alternative, the contract is voidable by that party. Restatement (Second) Contracts § 317 (1977)." 2 Haw. App. at 275, 630 P.2d at 649. Hall argues that Exit's actions were coercive because he had no alternative but to allow ACCI to be put into the streets. The argument is specious. First, Hall was aware when ACCI occupied the lease premises that Exit had not consented to the assignment. Second, even if he had been coerced his remedy was cancellation of the lease not tort damages. *Id.*

2.

HALL'S PRIVACY CLAIM

Hall bases his violation of privacy claim on article I, section 6, of the Hawaii State Constitution, which reads as follows:

RIGHT TO PRIVACY

> Section 6. The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Hall alleged that in their efforts to obtain his guarantee Exit Defendants threatened to and did reveal confidential and private matters regarding his financial affairs and his mental stability, which were revealed to Okabayashi "as an officer of the court" in prior litigation. Exit Defendants counter that article I, section 6 prohibits an invasion of privacy by state action, while Hall has merely alleged private action, for which Hall has no remedy. We agree with Exit Defendants. *See Nakano v. Matayoshi*, 68 Haw. —, 706 P.2d 814 (1985).

Moreover, assuming there is a private cause of action for the public disclosure of private facts, *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the record reveals that the "confidential information" about which Hall complains was previously publicized by Hall himself in the case of *Hall v. First Fed. Sav. & Loan Ass'n* (see note 9). Hall cannot complain about dissemination of information he himself exposed to public scrutiny. *See Cox Broadcasting Corp. v. Cohn, supra.* Finally, Hall's insinuation that Okabayashi, "as an officer of the court" acted improperly in reiterating the information is totally without merit.

3.

HALL'S DEFAMATION CLAIM

The amended complaint alleged that paragraph's 11 and 12 quoted above from Anderson's affidavit were de-

liberately false and defamatory and were based on information Okabayashi obtained from the brankruptcy proceedings "as an officer of the court." Hall also alleged that Okabayashi had filed a number of pleadings in *First Fed. Sav. & Loan Ass'n of Am. v. Hall,* First Circuit Court No. 85-0151, which are evidence of a "pattern of defamation [by Okabayashi] with the purpose of destroying [Hall's] business and personal reputation[.]" The statements cited by Hall are not actionable.

First, as we have noted, Anderson's and Okabayashi's statements concerned information which Hall himself previously publicized or was a matter of public record. Second, as a witness, Anderson was immune from liability for his statements, *see Nizinski v. Currington,* 517 P.2d 754 (Alaska 1974); *Todd v. Cox,* 20 Ariz. App. 347, 512 P.2d 1234 (1973); *Clear Water Truck Co. v. M. Bruenger & Co., Inc.,* 214 Kan. 139, 519 P.2d 682 (1974), and, as an attorney, Okabayashi was immune from liability for his. *McCarthy v. Yempuku,* 5 Haw. pp. 45, 678 P.2d 11 (1984).

In an effort to overcome the obvious insufficiency of his allegations, Hall states in his reply to Exit's answering brief that he never alleged that Anderson defamed him. Instead he contends that Anderson's statements were merely a means by which Hall knew Defendants had conspired to defame him. Hall's contention is a blatant misstatement of the record. In the amended complaint he alleged that both statements are false and defamatory.

Hall also contends in his reply briefs[12] that the pleadings he cited from *First Federal v. Hall* were also in-

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[12]Hall filed separate reply briefs to Exit's and Hulten's answering briefs.

tended only as evidence of Okabayashi's pattern of defamation, and argues that cross-examination at trial might reveal evidence of defamatory statements of which he is not aware.[13] Hall cannot defend against a summary judgment motion by relying on what he hopes to prove. *Costa v. Able Distributors, Inc., supra.*

We turn now to Hall's attack on the dismissal of his claim against Bell-Centre.

II.

In essence, Hall's claim against Bel-Centre in the amended complaint is that when it purchased Executive Centre it continued the "coercion" by assuming the lawsuit and continuing the demands that Hall submit to the conditions for assignment of the lease. Hall also alleged that Bel-Centre "stepped into Exit's shoes after receiving defamation from the other defendants and embracing acts that added to [Hall's] damage[.]"

When Bel-Centre's motion to dismiss was heard, the trial court noted that Hall had not filed any opposition to the motion and that the motion should be granted for that reason. The court also stated, however, that as a matter of law Hall had no cause of action against Bel-Centre, because it had not participated in any of the activities

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[13]Okabayashi did not file an answering brief but filed a joinder in Exit Defendants' answering brief. In his "Reply Brief * * * Re Joinder In Answering Brief" Hall argues that the factual matters in his opening brief should be held "uncontraverted" because Okabayashi's joinder was filed more than 40 days after the opening brief was mailed to him. The argument has no merit. Okabayashi's joinder adopted Exit's answering brief and Hall was not prejudiced by the late filing.

alleged in the complaint and had merely bought Exit's asset. In this appeal Hall argues only that the lower court erred because he had filed memoranda and the first three motions to strike (discussed *supra*, (see part I, A)), which were in opposition to both Bel-Centre's motion to dismiss and the Motion for Summary Judgment. We have examined the memoranda and the motions to which Hall refers and find that they can arguably be applied to Bel-Centre's motion to dismiss. Nevertheless, the trial court was correct in holding that as a matter of law Hall had no cause of action against Bell-Centre.

The thrust of Hall's allegations against Bel-Centre is that it was the "beneficiary" of the tortious acts of the other defendants. Except for the allegation that Bel-Centre continued to demand Hall's compliance with the conditions for assignment of the lease, there is no allegation that Bel-Centre directly caused any injury to Hall. Bel-Centre's alleged liability is strictly derived from the actions of the other defendants. Since we have found that summary judgment was properly entered in favor of those defendants, it follows that the lower court did not err in dismissing Hall's claim against Bel-Centre.[14]

III.

Hall also contends on appeal that the lower court erred in denying his fourth and fifth motions to strike. In view of the discussion in part I, Hall's arguments about the

---

[14]Even if Bel-Centre, on its own, had demanded that Hall comply with the assignment of lease application procedures, our discussion in part I, B, 1 of the opinion indicates Bel-Centre would not be liable to Hall.

fourth and fifth motions are without merit. The motions, and Hall's arguments, do not detract from the fact that the court's decision on the Motion for Summary Judgment was correct.

IV.

In the opening brief Hall raises the question whether "it [was] error or abuse of discretion to deny discovery[.]" We find no error.

Prior to dismissal of the original complaint Hall had served Defendants with requests for admissions and answers to interrogatories. When Defendants filed their motion to dismiss the original complaint they accompanied it with a motion for a protective order to allow them to file their responses within thirty days after the filing of an amended complaint, if one was allowed. On September 25, 1987, the court, in granting Defendants' motion to dismiss the original complaint, and allowing Hall to file an amended complaint, ruled that the motion for protective order was moot. We construe the order to mean that Defendants were not required to answer Hall's requests. Had the court intended otherwise it would have been a simple matter to grant the requested extension to thirty days after filing the amended complaint. We find no abuse of discretion, since Hall was free to file new interrogatories after the amended complaint.

Additionally, when Exit Defendants moved against the amended complaint, Hall did not file a Rule 56(f), HRCP affidavit or request time for discovery. He claims to have been "railroaded," apparently by the early filing of the Motion for Summary Judgment; however, his remedy if

he wanted to have discovery, was to seek a delay under Rule 56(f). *Wilder v. Tanouye*, 7 Haw. App. —, —, 753 P.2d 816, 820-821 (1988). Having chosen his tack in this odyssey, Hall cannot now complain.

V.

Defendants argue that Hall's appeal is frivolous and that they should be awarded attorney's fees and costs under Rule 38, Hawaii Rules of Appellate Procedure (HRAP) (1984). We agree.

"An appeal is frivolous when 'the result is obvious, or the appellant's arguments of error are wholly without merit.' *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (citations omitted)[.]" *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987). We have held that an appeal is frivolous where examination of the record convinces us that the appeal is " 'manifestly and palpably without merit.' " *Harada v. Ellis*, 4 Haw. App. 439, 446, 667 P.2d 834, 839 (1983) (quoting *Kawaihae v. Hawaiian Ins. Companies*, 1 Haw. App. 355, 360-361, 619 P.2d 1086, 1090 (1980)). On the basis of the above discussion of Hall's arguments on appeal, we are indeed convinced that this appeal is frivolous.[15] Consequently, Hall will be ordered to pay Defendants reasonable attorney's fees and costs for this appeal upon Defendants' filing of a request in this court for their determination and award.

Affirmed.

DATED: Honolulu, Hawaii, January 12, 1989.

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[15]Hall presented several other arguments in support of his appeal. We have considered those arguments and find them utterly devoid of merit and unworthy of discussion.

/s/ James S. Burns (Illegible)

Robert W. Hall,
plaintiff-appellant,
pro se, on the briefs.

/s/ Walter M. Heen

D. Barclay Bryan
on the brief for defendant-
appellee Hulten.

/s/ Harry T. Tanaka

John T. Komeiji, Jan M.L.Y.
Amii (Kobayashi, Watanabe,
Su[g]ita, Kawashima & Goda
of counsel), James E. Duffy,
Jr., and Paul H. Sato
(Fujiyama, Duffy & Fujiyama,
of counsel) on the brief
for defendants-appellees
Exit, Howard, Bancorp and
Bel-Centre.

Joinder in the answering brief
of Exit, Howard, Bancorp and
Bel-Centre:

James P. Dandar, Shelton G.W.
Jim On, and Jayson C.W. Pang
(Dandar, Manuia & Castroverde,
of counsel) for defendant-
appellee Okabayashi.

NO. 12670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT W. HALL, An Individual,	) CIVIL NO. 87-2390
Plaintiff-Appellant,	) APPEAL FROM THE: 1) ORDER GRANTING DEFENDANTS HENRY E. HOWARD, EXIT COMPANY LIMITED
vs.	)
NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,	) PARTNERSHIP AND BANCORP HAWAII SERVICE CORP.'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, FILED DECEMBER 22, 1987; 2) ORDER DENYING FOURTH CROSS-MOTION TO STRIKE OR IN THE ALTERNATIVE AN OBJECTION, FILED DECEMBER 7, 1987; 3) ORDER DENYING FIFTH CROSS-MOTION TO STRIKE, FOR DEFAULT OR IN THE ALTERNATIVE AN OBJECTION, FILED DECEMBER 3, 1987; and 4) ORDER RE DEFENDANT BEL-CENTRE, INC.'S MOTION TO DISMISS AMENDED COMPLAINT AND JOINDER IN DEFENDANTS HENRY E. HOWARD, EXIT COM-
Defendants-Appellees.	

)PANY LIMITED PART-
)NERSHIP AND BANCORP
)HAWAII SERVICE
)CORP.'S MOTION TO
)DISMISS, OR ALTERNA-
)TIVELY, FOR SUMMARY
)JUDGMENT, FILED
)OCTOBER 21, 1987
)
)FIRST CIRCUIT COURT
)
)HONORABLE ROBERT
)G. KLEIN
)HONORABLE SIMEON
)ACOBA, JR.
)Judges

JUDGMENT ON APPEAL

(Filed Mar. 8, 1989)

CERTIFICATE OF SERVICE

D. BARCLAY BRYAN 624
Attorney at Law

Suite 1657, Pioneer Plaza
900 Fort Street
Honolulu, Hawaii 96813
Tel. No. 536-7744

Attorney for Defendant-Appellee
JOHN J. HULTEN, JR. ATTORNEY AT
LAW, A LAW CORPORATION

NO. 12670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT W. HALL, An Individual,	) CIVIL NO. 87-2390
Plaintiff-Appellant,	) APPEAL FROM THE: 1) ORDER GRANTING) DEFENDANTS HENRY
vs.	) E. HOWARD, EXIT) COMPANY LIMITED
NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,	) PARTNERSHIP AND) BANCORP HAWAII) SERVICE CORP.'S) MOTION FOR SUMMARY) JUDGMENT AND DENY-) ING PLAINTIFF'S) CROSS-MOTION FOR) SUMMARY JUDGMENT,) FILED DECEMBER 22,) 1987; 2) ORDER DENY-) ING FOURTH CROSS-) MOTION TO STRIKE OR) IN THE ALTERNATIVE) AN OBJECTION, FILED) DECEMBER 7, 1987; 3)) ORDER DENYING FIFTH) CROSS-MOTION TO) STRIKE, FOR DEFAULT) OR IN THE ALTERNA-) TIVE AN OBJECTION,) FILED DECEMBER 3,) 1987; and 4) ORDER RE) DEFENDANT BEL-) CENTRE, INC.'S MOTION) TO DISMISS AMENDED) COMPLAINT AND) JOINDER IN DEFEN-) DANTS HENRY E.
Defendants-Appellees.	

)HOWARD, EXIT COM-
)PANY LIMITED PART-
)NERSHIP AND BANCORP
)HAWAII SERVICE
)CORP.'S MOTION TO
)DISMISS, OR ALTERNA-
)TIVELY, FOR SUMMARY
)JUDGMENT, FILED
)OCTOBER 21, 1987
)
)FIRST CIRCUIT COURT
)
)HONORABLE ROBERT
)G. KLEIN
)HONORABLE SIMEON
)ACOBA, JR.
)Judges

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals entered on January 12, 1989, the Orders of the First Circuit Court entered on October 21, 1987, December 3, 1987, December 7, 1987 and December 22, 1987 are affirmed; and

Pursuant to Order Approving Verified Bill of Costs and Fees entered herein on February 16, 1989, Defendants-Appellees Henry E. Howard, Exit Company Limited Partnership, Bancorp Hawaii Service Corporation and Bel-Centre, Inc.'s request for costs and attorney's fees from Plaintiff-Appellant Robert Hall totalling $1,881.65 is granted; and

Pursuant to Order Approving Verified Bill of Costs and Fees entered herein on February 23, 1989, Defendant-Appellee John J. Hulten, Jr. Attorney at Law, a Law Corporation's request for costs and attorney's fees from

Plaintiff-Appellant Robert Hall totalling $3,125.70 is granted.

DATED: Honolulu, Hawaii, Mar. 8, 1989.

BY THE COURT

/s/ Darrell M. Phillips
Clerk

Approved:

/s/ Walter M. Heen
Judge

(SEAL)

NO. 12670

IN THE SUPREME COURT
OF THE STATE OF HAWAII

ROBERT W. HALL, an Individual, Petitioner-Appellant,	)
vs.	) CIV. NO. 87-2390
NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation, Respondents-Appellees,	) APPLICATION FOR WRIT OF CERTIORARI) INTERMEDIATE COURT OF APPEALS) HONORABLE JAMES S. BURNS, WALTER M. HEEN AND HARRY T. TANAKA, Judges

ORDER

(Filed February 10, 1989)

The Application for Writ of Certiorari filed on February 6, 1989 is hereby denied.

DATED: Honolulu, Hawaii, February 10, 1989.

FOR THE COURT:

/s/ H. Lum
Chief Justice

Robert W. Hall, pro se,
for the writ

(SEAL)

NO. 12670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT W. HALL, an Individual, Plaintiff-Appellant, vs. NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation, Defendants-Appellees.	) CIV. NO. 87-2390

MEMORANDUM ORDER DENYING MOTION
FOR RECONSIDERATION

(Filed Jan. 27, 1989)

NO. 12670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT W. HALL,
an Individual,

Plaintiff-Appellant,

vs.

NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation, Defendants-Appellees.	CIV. NO. 87-2390

MEMORANDUM ORDER DENYING MOTION FOR RECONSIDERATION

This court having considered Plaintiff-Appellant's Motion for Reconsideration filed January 23, 1989, and the memorandum in support thereof, it is hereby ordered that said motion is denied.

DATED: Honolulu, Hawaii, January 27, 1989.

/s/ James S. Burns
/s/ Walter M. Hu
/s/ Harry T. Tanaka

Robert W. Hall, *pro se* plaintiff-appellant, on the motion.

NO. 12670

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT W. HALL, an Individual,	)	
Plaintiff-Appellant,	)	
vs.	)	
NEAL K. OKABAYASHI, an Individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,	)	CIV. NO. 87-2390
Defendants-Appellees.	)	

ORDER DENYING MOTION FOR ORAL HEARING

(Filed Jan. 11, 1989)

This court having considered Plaintiff-Appellant's Motion for Oral Hearing filed on January 9, 1989, and the argument in support thereof, it is hereby ordered that said motion is denied.

DATED: Honolulu, Hawaii, January 11, 1989.

/s/ James S. Burns
/s/ Walter M. Hu
/s/ Harry T. Tanaka

Robert W. Hall,
pro se plaintiff-
appellant on the
motion.

(SEAL)

No. 88-1787

Supreme Court, U.S.
FILED
JUN 2 1989
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. HALL,

Petitioner,

v.

NEAL K. OKABAYASHI, an individual, JOHN J. HULTEN, JR., ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,

Respondents.

On Petition for a Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii

---

BRIEF FOR RESPONDENTS HENRY E. HOWARD, EXIT COMPANY LIMITED PARTNERSHIP, BANCORP HAWAII SERVICE CORPORATION, AND BEL-CENTRE, INC. IN OPPOSITION

CYNTHIA WINEGAR
(Counsel of Record)
JOHN T. KOMEIJI
JAN M. L. Y. AMII
KOBAYASHI, WATANABE, SUGITA, KAWASHIMA & GODA
Hawaii Tower, 8th Floor
745 Fort Street
Honolulu, Hawaii 96813

Attorneys for Respondents Henry E. Howard, Exit Company Limited Partnership, Bancorp Hawaii Service Corporation, and Bel-Centre, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Rule 38 of the Hawaii Rules of Appellate Procedure, which permits the award of attorney's fees and costs when the Court determines that an appeal is frivolous, is constitutionally valid.

2. Whether the Hawaii Intermediate Court of Appeals properly imposed sanctions after finding that an appeal was frivolous.

LIST OF PARTIES AND AFFILIATIONS

Respondents are in agreement with the List of Parties and Rule 28.1 List submitted by the Petitioner in his Petition for Writ of Certiorari.

The parties to the proceedings below were Petitioner ROBERT W. HALL and Respondents NEAL K. OKABAYASHI, an individual, JOHN J. HULTEN, JR. ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation.

BANCORP HAWAII SERVICE CORPORATION is affiliated with BANCORP HAWAII, INC. and its subsidiary BANK OF HAWAII, BEL-CENTRE, INC. is affiliated with BELMARIN INVESTMENTS N.V., a Netherlands Antilles company.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
REASONS THE WRIT SHOULD NOT BE GRANTED	4
I. RULE 38 OF THE HAWAII RULES OF APPELLATE PROCEDURE IS REASONABLY TAILORED TO ACHIEVE THE LEGITIMATE OBJECTIVES OF DISCOURAGING FRIVOLOUS APPEALS AND CONSERVING JUDICIAL RESOURCES	4
II. THE HAWAII INTERMEDIATE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND SANCTIONS AGAINST PETITIONER FOR FILING A FRIVOLOUS APPEAL	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Page

Bankers Life and Casualty Company v. Crenshaw, 486 U.S. ——, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) 4

Clarion Corp. v. American Home Products Corp., 494 F.2d 860 (7th Cir. 1974), *cert. denied*, 419 U.S. 870, 95 S.Ct. 128, 42 L.Ed.2d 108 6

Dunscombe v. Sayle, 340 F.2d 311 (5th Cir. 1965) .. 4

Fluoro Electric Corp. v. Branford Assoc., 489 F.2d 320 (2d Cir. 1973) 4

Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), *reh'g denied*, 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112 ..... 5, 6

Roe v. Kansas, 278 U.S. 191, 193, 49 S.Ct. 160, 73 L.Ed. 259 (1929) 4

Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980) 5, 7

Slaker v. O'Connor, 278 U.S. 188, 190, 49 S.Ct. 158, 73 L.Ed. 258 (1929) 4

Wood v. McEwen, 644 F.2d 797 (9th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 6

Annotations

Annot., 67 A.L.R. Fed. 319 (1980) 5

Rules

Rule 49.2 of the Rules of the Supreme Court of the United States 4

Rule 38 of the Federal Rules of Appellate Procedure 4

Rule 38 of the Hawaii Rules of Appellate Procedure ..... *passim*

Other References

16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure Section 3984 at 465 (1977) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1787

ROBERT W. HALL,

Petitioner,

v.

NEAL K. OKABAYASHI, an individual, JOHN J. HULTEN, JR., ATTORNEY AT LAW, A LAW CORPORATION, a Hawaii Professional Corporation, HENRY E. HOWARD, an Individual, EXIT COMPANY LIMITED PARTNERSHIP dba Executive Centre, a Hawaii Limited Partnership, BANCORP HAWAII SERVICE CORPORATION, a Hawaii Corporation, BEL-CENTRE, INC., dba Executive Centre, a Hawaii Corporation,

Respondents.

On Petition for a Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii

---

BRIEF FOR RESPONDENTS HENRY E. HOWARD, EXIT COMPANY LIMITED PARTNERSHIP, BANCORP HAWAII SERVICE CORPORATION, AND BEL-CENTRE, INC. IN OPPOSITION

Respondents Henry E. Howard, Exit Company Limited Partnership, Bancorp Hawaii Service Corporation, and Bel-Centre, Ltd. respectfully pray that the Petition for a Writ of Certiorari of Robert W. Hall be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner's four-count amended complaint against Respondents sought damages for alleged coercion, defamation, and invasion of privacy. The Respondents filed a motion for summary judgment arguing, among other things, that there can be no "coercion" where a person requires a financial guarantee from a potential lessee, that there can be no defamation from the disclosure of documents that the Petitioner had previously used in court proceedings, and finally that there can be no constitutional invasion of privacy without "state action". The Hawaii trial court, finding no issue of material fact, granted summary judgment to the Respondents on all counts. Petitioner then filed an appeal.

In response to the Petitioner's opening brief, Respondents argued that Petitioner's appeal was frivolous and requested the award of their attorneys' fees and costs for defending the appeal. Petitioner did not respond to this argument in his reply brief.

The Hawaii Intermediate Courts of Appeals issued a Memorandum Opinion wherein it characterized the Petitioner's different arguments on appeal as "specious" and "wholly without merit." The Court disposed of many of Petitioner's claims by stating in a footnote that the assertions were "utterly devoid of merit and unworthy of discussion." The Court affirmed the trial court's granting of summary judgment to the Respondents and also ruled that the Petitioner's appeal was "frivolous." Pursuant to Rule 38 of the Hawaii Rules of Appellate Procedure, the Court awarded to Respondents their reasonable attorneys' fees and costs of $1,881.65 for defending the appeal. The Court also awarded the sum of $3,125.70 in costs and attorney's fees to another party having to defend against the Petitioner's appeal.

Petitioner filed a motion for reconsideration contesting the Court's decision, including the award of attorneys'

fees and costs. Petitioner's motion for reconsideration was denied.

Petitioner then filed in the Hawaii Supreme Court an Application for Writ of Certiorari, again arguing, among other things, that he should not have to pay Respondents' reasonable attorneys' fees and costs. The Hawaii Supreme Court denied the Petitioner's Application for Writ of Certiorari.

The present Petition for Writ of Certiorari in the Supreme Court of the United States followed. Respondents are again having to incur further attorneys' fees and costs in opposing the instant action.

SUMMARY OF ARGUMENT

The Hawaii Intermediate Court of Appeals ruled that the appeal taken by Petitioner was frivolous and manifestly without merit. Pursuant to Rule 38 of the Hawaii Rules of Appellate Procedure the Court awarded reasonable attorneys' fees and costs to the Respondents for having to defend against such an appeal.

There is no merit to the claims of Petitioner that Rule 38 and the action taken by the Hawaii Intermediate Court of Appeals was unconstitutional. Rule 38 of the Hawaii Rules of Appellate Procedure is very similar to Rule 38 of the Federal Rules of Appellate Procedure and Rule 49.2 of the Rules of the Supreme Court of the United States. Rule 38 is reasonably tailored to achieve the legitimate objective of discouraging frivolous appeals. The Hawaii Intermediate Court of Appeals decision to award reasonable attorneys' fees and costs was a proper exercise of the court's power to manage its own affairs. This Court should deny the instant Petition.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. RULE 38 OF THE HAWAII RULES OF APPELLATE PROCEDURE IS REASONABLY TAILORED TO ACHIEVE THE LEGITIMATE OBJECTIVES OF DISCOURAGING FRIVOLOUS APPEALS AND CONSERVING JUDICIAL RESOURCES.

Petitioner has asserted that the "essence" of his appeal is that the "Hawaii Supreme Court has adopted, and the Hawaii ICA has applied a patently unconstitutional court Rule 38, Hawaii Rules of Appellate Procedure."

Examination of Rule 38 of the Hawaii Rules of Appellate Procedure shows that it is very similar to Rule 38 of the Federal Rules of Appellate Procedure and Rule 49.2 of the Rules of the Supreme Court. All of these rules provide that an appeals court has the power to impose sanctions against a party who takes a frivolous appeal. There is nothing "patently" unconstitutional about the adoption of such rules. Petitioner does not and cannot identify anything about Rule 38 of the Hawaii Rules of Appellate Procedure that would render it unconstitutional. The Hawaii Appellate Courts have a legitimate interest in discouraging frivolous appeals and in conserving judicial resources. Rule 38 is carefully drafted to achieve this result. *See Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. ——, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) (where the Court upheld a statute that assessed a 15% penalty against parties who appeal unsuccessfully from money judgments).

Though sanctions for a frivolous appeal should be invoked judiciously and with caution, there is no question that the courts have the power to impose sanctions. *See Roe v. Kansas*, 278 U.S. 191, 193, 49 S.Ct. 160, 73 L.Ed. 259 (1929); *Slaker v. O'Connor*, 278 U.S. 188, 190, 49 S.Ct. 158, 73 L.Ed. 258 (1929); *Fluoro Electric Corp. v. Branford Assoc.*, 489 F.2d 320 (2d Cir. 1973); *Duns-*

combe v. Sayle, 340 F.2d 311 (5th Cir. 1965); Annot., 67 A.L.R. Fed. 319 (1980). This power comes from the control necessarily vested in courts to efficiently manage their own affairs. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), *reh'g denied*, 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112 (where the Court upheld a dismissal with prejudice for failing to appear at a pretrial conference and failing to prosecute the case).

There is no support for Petitioner's claim that Rule 38 of the Hawaii Rules of Appellate Procedure is unconstitutional.

II. THE HAWAII INTERMEDIATE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND SANCTIONS AGAINST PETITIONER FOR FILING A FRIVOLOUS APPEAL.

Petitioner has made the statement that he was "bushwacked" and "blind-sided" and that he had no prior notice and no opportunity to address the issue of sanctions for filing a frivolous appeal. These statements are not accurate.

Respondents, in addressing the points made by the Petitioner in his appeal, clearly set forth in their answering brief that the appeal taken by the Petitioner was frivolous and Respondents requested their attorneys' fees and costs. Petitioner had the opportunity to respond directly to these charges in his reply brief but did not do so. Petitioner was given notice and did have an opportunity to respond to the request for sanctions.

Furthermore, even if the Petitioner had not received any prior notice, the Intermediate Court of Appeals could still have imposed sanctions against the Petitioner. In *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980), the Court of Appeals awarded damages and double costs for a frivolous appeal, even though no one requested such an

award and there was no hearing on the question of sanctions. The Seventh Circuit Court of Appeals, in exercising its inherent power, imposed sanctions on its own initiative, citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure Section 3984 at 465 (1977). The Court reasoned that though one of the parties to an appeal normally makes a request for its attorney's fees when an appeal is frivolous, the Court can, in egregious cases, impose sanctions on its own to deter frivolous appeals and preserve the court's calendar for cases worthy of consideration. 614 F.2d at 1132.

Similarly, in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), *reh'g denied*, 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112, it was held that a trial court had the inherent power to dismiss a case with prejudice, without advance notice or a hearing. The Court in *Link* made it clear that the absence of notice or the failure to hold an adversary hearing did not render the trial court's dismissal of the case void. The adequacy of the notice and hearing provided to the parties turned upon the circumstances of the issue involved and the knowledge that the parties should have had of the possible consequences of their conduct. *Id.* at 632.

In the instant case, with or without a hearing, the Petitioner should have known that his appeal was without merit and that if he proceeded it would be at his own jeopardy. Though he claims that he is not a trained attorney, this was not his first experience with the Hawaii Courts and he should not be permitted to use his pro se status as a shield. He elected to proceed without an attorney and in so doing he took on the responsibilities that an attorney would otherwise have borne. *See Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir. 1974), *cert. denied*, 419 U.S. 870, 95 S.Ct. 128, 42 L.Ed.2d 108 (where pro se appellant should have understood that the refusal of attorneys to represent him was not a conspiracy but instead a recognition of the frivolity of his position); *Wood v. McEwen*, 644 F.2d 797

(9th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (where pro se appellant repeatedly raised the same claims and had become burdensome and costly to other parties). There was nothing that the Petitioner or any attorney in his place could have submitted at a hearing that would have affected the merits of this appeal. A formal hearing on the matter would only have resulted in a further waste of judicial resources. There was no denial of Petitioner's due process rights.

Finally, Petitioner has argued that he and other litigants are being denied free access to Hawaii's Appellate Courts by the imposition of sanctions for frivolous appeals. Petitioner does not cite any case on point and Petitioner's reasoning is too narrow. While freedom of access to the courts must indeed be protected, every misuse of judicial process is a misuse of the court's time and necessarily impinges upon the right of other litigants with valid claims. *See Ruderer v. Fines*, 614 F.2d 1128, 1133 (7th Cir. 1980). The major purpose of Rule 38 of the Hawaii Appellate Rules is to minimize the time devoted to the disposition of appeals that are plainly without merit. The instant case is a striking example of the immense amount of judicial resources that are wasted by a frivolous appeal. Sanctions imposed by the Intermediate Court of Appeals should deter further frivolous appeals and will permit the court to devote its limited time and resources to matters that deserve consideration.

Rule 38 of the Hawaii Rules of Appellate Procedure has a legitimate purpose and its careful use will result in greater and more efficient use of the appellate courts in Hawaii.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that certiorari be denied.

Respectfully submitted,

CYNTHIA WINEGAR
(Counsel of Record)
JOHN T. KOMEIJI
JAN M. L. Y. AMII
KOBAYASHI, WATANABE, SUGITA,
KAWASHIMA & GODA
Hawaii Tower, 8th Floor
745 Fort Street
Honolulu, Hawaii 96813
Attorneys for Respondents
Henry E. Howard, Exit Company
Limited Partnership, Bancorp
Hawaii Service Corporation, and
Bel-Centre, Inc.